

SERVED: June 5, 2006

NTSB Order No. EA-5225

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 31<sup>st</sup> day of May, 2006

_____	)	
MARION C. BLAKEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket No. SE-17205
v.	)	
	)	
CHRISTIAN G.T. NADAL,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision and order of Administrative Law Judge Patrick G. Geraghty, issued June 1, 2005, in this matter.<sup>1</sup> The Administrator's order suspended respondent's airline transport pilot certificate for

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<sup>1</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached.

60 days, based on an alleged violation of 14 C.F.R. §§ 91.123(b)<sup>2</sup> and 91.13(a).<sup>3</sup> The law judge concluded that respondent had violated both regulations, as alleged, and affirmed the 60-day suspension of respondent's certificate. Respondent appeals the suspension, arguing that the law judge erred in several of his evidentiary and procedural rulings at the administrative hearing, and that such rulings preclude a finding that respondent committed these violations. We deny respondent's appeal.

The Administrator's September 2, 2004 order, which served as the complaint before the law judge, alleged that respondent, as pilot-in-command on a flight departing from Los Angeles International Airport (LAX), violated ATC instructions to "hold short" of runway 25L. The complaint alleges that respondent's first officer acknowledged the ATC instruction, but that, instead of holding short of runway 25L, respondent subsequently crossed runway 25L, thereby causing ATC to instruct an approaching aircraft to "go around." As a result, the Administrator's order charged respondent with operating contrary

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<sup>2</sup> Section 91.123(b) states that, "[e]xcept in an emergency, no person may operate an aircraft contrary to an [air traffic control (ATC)] instruction in an area in which air traffic control is exercised."

<sup>3</sup> Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

to an ATC instruction, and with carelessly operating the aircraft, in violation of §§ 91.123(b) and 91.13(a), respectively.

The law judge held that respondent violated ATC instructions by not holding short of runway 25L. The law judge acknowledged that the ATC instruction to hold short required respondent to enter and hold in an area known as the Instrument Landing System (ILS) critical area.<sup>4</sup> The law judge noted that respondent had presented expert testimony that ATC's instructions to enter the ILS critical area prior to the incursion may not have been appropriate. Transcript (Tr.) 118-119. The law judge also acknowledged that the Board has previously held that, where the evidence shows that ATC involvement initiated or contributed to the pilot's runway incursion, the Board will consider such evidence as a mitigating factor. Tr. 124. The law judge, however, concluded that respondent did not show that ATC made an operational error, or that any such error led to his failure to hold short of runway 25L. Tr. 122-23. As a result, the law judge affirmed the 60-day suspension.

In his appeal, respondent does not challenge the fact that he violated an ATC instruction by failing to hold short of

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<sup>4</sup> ILS critical areas, which are designated on taxiways with special markings, are those areas in which surface vehicles or aircraft might interfere with ILS system signals.

runway 25L, as instructed. In fact, respondent does not challenge any material facts in his appeal. Instead, respondent presents three arguments based on the law judge's evidentiary rulings at the hearing: respondent argues that the law judge (1) should have admitted three exhibits that discuss runway 25L at LAX; (2) should not have allowed one of the Administrator's witnesses to be present during the hearing, while other witnesses were ordered sequestered; and (3) should not have admitted a document that contained a statement from respondent's co-pilot, when his co-pilot did not testify, nor a hypothetical question that did not have a proper foundation.

When resolving issues involving the admission of evidence, the Board considers the Federal Rules of Evidence to be "non-binding guidance." Petition of Cary A. Neihans, NTSB Order No. 5166 at 3 n.9 (2005) (citing Administrator v. Comer, NTSB Order No. EA-3967 at 3 n.9 (1993)). In addition, the Board's standard for reviewing issues on appeal includes evaluating the law judge's findings of fact and conclusions of law, asking whether the law judge committed any prejudicial errors, and determining whether either party has presented substantial questions on appeal. 49 C.F.R. § 821.49(a). As such, the Board will only entertain evidentiary questions when they amount to prejudicial error. See generally Administrator v. Blair, NTSB Order No. EA-

4253 at 2 n.10 (1994) (stating that the law judge had improperly excluded evidence, but that the error was harmless).<sup>5</sup>

In the case at hand, respondent has not shown how the law judge's evidentiary rulings amounted to prejudicial error. If we agreed with respondent's argument that the law judge should have allowed him to introduce the three exhibits that address runway 25L at LAX (the FAA Runway Safety Report, LAX Bulletin, and Runway Safety Blueprint), it would not change the outcome of this case. While those publications do discuss previous incursions involving runway 25L at LAX, they do not show that respondent did not violate ATC instructions, nor that respondent's runway incursion was excusable.

In addition, respondent does not specify how the law judge's exclusion of the Administrator's witness, Mr. Sweeney, from the sequestration order was prejudicial. At the hearing, the Administrator requested that two witnesses be excluded from sequestration: Mr. Steve Allen, an FAA Aviation Safety Inspector, and Mr. Frank Sweeney, a supervisor of the LAX ATC tower. Respondent objected to both of those requests for exclusion, and the law judge decided that only Mr. Sweeney could remain, as an expert witness, to observe the hearing. Tr. 9.

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<sup>5</sup> We also note that, under the law, an error is considered *prejudicial* when it "actually [affects] the outcome of the proceedings." United States v. Hastings, 134 F.3d 235, 240 (4<sup>th</sup> Cir. 1998).

Respondent argues that such an exclusion amounted to an "unfair advantage" for the Administrator, but does not explain how he was harmed by this ruling: respondent does not argue that Mr. Sweeney's testimony would have been different if he had not been present throughout the hearing.<sup>6</sup> Moreover, the law judge allowed Mr. Sweeney to be excluded from the sequestration order because respondent's counsel had failed to meet the deadline for disclosing expert witnesses, thereby not affording the Administrator the same amount of time to prepare for expert testimony as respondent received. In this regard, our regulations allow law judges considerable discretion when conducting hearings and ruling on evidentiary matters. See 49 C.F.R. § 821.35(b). Overall, we see no basis for disturbing the law judge's ruling on this issue. Furthermore, we do not find that the law judge's ruling on this sequestration issue would have altered the outcome of this case.

With regard to respondent's argument that the law judge should not have admitted Inspector Allen's record of a meeting with respondent's co-pilot, Ms. Beatrice Lieckens, respondent has not shown how this ruling was prejudicial. Respondent

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<sup>6</sup> Respondent's argument that "allowing the Administrator's witness to listen to [respondent's] expert's testimony provides the Administrator with an opportunity to present evidence tailored in response to [respondent's] expert's testimony" is inconsequential. Resp't Brief at 6. In every case, the Administrator attempts to present evidence on rebuttal that refutes a respondent's defense.

argues that Ms. Lieckens's statements in the record<sup>7</sup> were irrelevant because they do not address respondent's conduct prior to committing the runway incursion. We are not persuaded that the statement is irrelevant. In addition, respondent has not shown that the admission of this document into evidence affected the outcome of the case. Therefore, we cannot conclude that it constituted prejudicial error.

Similarly, respondent argues that the law judge erroneously allowed the Administrator's counsel to ask an expert witness a hypothetical question regarding what response the expert would expect from a pilot who questions an ATC instruction. Tr. 79-80. Respondent objected to this question at the hearing, arguing that the Administrator's counsel did not establish a proper foundation for the question. Tr. 80. In response to this objection, the law judge clarified the hypothetical and allowed the Administrator's counsel to continue with the inquiry. Id. Respondent has not shown that this hypothetical question affected the outcome of the case. In light of the overwhelming evidence that respondent committed this runway incursion,<sup>8</sup> the record would support a finding of violation in

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<sup>7</sup> According to the record of meeting, Ms. Lieckens said that she questioned respondent's actions while he was crossing runway 25L without authorization, and that she later wished she had spoken up sooner.

<sup>8</sup> See Exhibit A-3 at 4 (transcript of ATC communications, in which respondent apologizes to ATC for the incursion) and Tr.

this case even if the Administrator's counsel had not proceeded with the hypothetical.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's initial decision is affirmed; and
3. The 60-day suspension of respondent's airline transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>9</sup>

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HERSMAN, and HIGGINS, Members of the Board, concurred in the above opinion and order.

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(continued)

104 (respondent's counsel's statement acknowledging the runway incursion).

<sup>9</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).